

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

14 This Report and Recommendation is made to the Honorable Miranda M. Du, United States
15 District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C.
16 § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

17 Before the court is Plaintiff's Motion for Leave to Amend Complaint. (ECF No. 23.) Defendants
18 did not file a response. After a thorough review, it is recommended that the motion be granted in part
19 and denied in part.

I. SCREENING

21 || A. Standard

22 “The court shall review, before docketing, if feasible or, in any event, as soon as practicable after
23 docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or
24 office or employee of a governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify
25 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1) is
26 frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary
27 relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b)(1)-(2).

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1 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided
2 for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C.
3 § 1915A(b)(1) track that language. Thus, when reviewing the adequacy of a complaint under 28 U.S.C.
4 § 1915(e)(2)(B)(ii) or 28 U.S.C. § 1915A(b)(1), the court applies the same standard as is applied under
5 Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under 12(b)(6)
6 is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723
7 (9th Cir. 2000) (citation omitted).

8 In reviewing the complaint under this standard, the court must accept as true the allegations,
9 construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's
10 favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se
11 complaints are "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v.*
12 *Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation omitted).

13 A complaint must contain more than a "formulaic recitation of the elements of a cause of action,"
14 it must contain factual allegations sufficient to "raise a right to relief above the speculative level."
15 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more
16 ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action."
17 *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1216, at 235-36 (3d ed. 2004)).
18 At a minimum, a plaintiff should state "enough facts to state a claim to relief that is plausible on its
19 face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

20 A dismissal should not be without leave to amend unless it is clear from the face of the complaint
21 that the action is frivolous and could not be amended to state a federal claim, or the district court lacks
22 subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995);
23 *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

24 **B. Discussion**

25 Plaintiff filed his original Complaint, which the court screened, and the court determined Plaintiff
26 could proceed with the following: a claim for violation of the Americans with Disabilities Act (ADA)
27 against McDaniel, Stroud, Buencamino, Moyle, Cox, Gedney and Baca based on allegations that he has
28 a mobility disability requiring a wheelchair, and Defendants refused to accommodate him at High Desert

1 State Prison (HDSP); and a claim for deliberate indifference to serious medical needs under the Eighth
2 Amendment against McDaniel, Stroud, Buencamino, Moyle, Cox, Gedney and Baca, based on
3 allegations they were aware of an order that he required a wheelchair but disregarded the risk of his not
4 having a wheelchair at HDSP. (Screening Order, ECF No. 3.) The Complaint did not contain facts to
5 support a claim against Romeo Aranas; therefore he was dismissed without prejudice. (*Id.*)

6 Plaintiff now seeks leave to amend, and submits a proposed First Amended Complaint (FAC).
7 (ECF No. 23.) The proposed FAC names Romeo Aranas, Tito Beuncamino, J. Murphy, Isidro Baca,
8 Shannon Moyle, and Karen Gedney. (ECF No. 23 at 3-5.) Plaintiff alleges that Defendants refused to
9 provide him with necessary, physician-ordered hip replacement surgery; effective pain medication to
10 treat pain associated with his degenerative hip disease; and transferred him to a non-ADA compliant
11 facility where he was deprived of a wheelchair for sixteen months despite the fact that there was a
12 medical order stating that he required a wheelchair and a “flat yard.” Specifically, he contends that in
13 early 2015, Gedney, Moyle, and Baca classified Plaintiff to be transferred to HDSP, knowing of his
14 medical restrictions. Once at HDSP, he filed a grievance complaining of extreme pain and difficulty
15 using the toilet, shower, and accessing the dining hall related to being deprived of a wheelchair. He also
16 noted the order for hip surgery. Murphy responded to the grievance, but Plaintiff claims she ignored his
17 complaints of pain, and took no effort to see that Plaintiff got a wheelchair, walker or handicap cell. He
18 filed a first level grievance, and Buencamino responded. Again, Plaintiff alleges that his requests for a
19 wheelchair, pain relief and surgery were ignored. He filed a second level grievance, and Aranas
20 responded. Plaintiff contends that Aranas ignored Plaintiff’s medical concerns. He also contends that
21 Aranas, a member of the Utilization Review Panel (URP), failed to submit Plaintiff’s case concerning
22 hip replacement surgery. Plaintiff goes on to allege that Gedney treated him while at Northern Nevada
23 Correctional Center (NNCC), and only prescribed him ibuprofen despite knowledge that this did not
24 alleviate his pain.

25 The court finds that Plaintiff states colorable claims for violation of the ADA and Eighth
26 Amendment deliberate indifference to serious medical needs against Gedney, Moyle, Baca, Murphy,
27 Buencamino and Aranas. *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (prisoner may state
28 an ADA claim based on the “alleged deliberate refusal of prison officials to accommodate [a prisoner’s]

1 disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other
2 prison programs.”); *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (prison official violates the Eighth
3 Amendment when he acts with deliberate indifference to a serious medical need)

4 Plaintiff attempts to assert a claim for violation of the Due Process Clause based on his transfer
5 to HDSP; however, that claim should not be allowed to proceed. An inmate does not have a right to be
6 placed in a particular facility; nor is the court permitted to second-guess the prison’s decisions regarding
7 a prisoner’s classification to a particular facility. *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976).

8 Plaintiff also mentions the Due Process Clause in the context of his allegations of denial of
9 adequate medical care; however, those allegations give rise to claims under the Eighth Amendment and
10 not the Due Process Clause.

11 Finally, the FAC asserts state law claims of medical malpractice against the Defendants;
12 however, Nevada law requires an action for medical malpractice to be dismissed if it is filed without an
13 affidavit by a medical expert that supports the allegations. Nev. Rev. Stat. 41A.071. The Nevada
14 Supreme Court has held that a medical malpractice action filed without the supporting affidavit is “void
15 *ab initio*, meaning it is of no force and effect.” *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 148 P.3d 790,
16 794, 122 Nev. 1298 (2006). Such an action “does not legally exist and thus it cannot be amended.” *Id.*
17 Plaintiff’s FAC does not contain the required affidavit; accordingly, Plaintiff’s state law claims for
18 medical malpractice should be dismissed without leave to amend.

19 **II. RECOMMENDATION**

20 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order:

21 (1) **GRANTING IN PART AND DENYING IN PART** Plaintiff’s Motion for Leave to Amend
22 Complaint (ECF No. 23) as follows:

23 (a) Plaintiff should be permitted to **PROCEED** with his claims under the ADA and the
24 Eighth Amendment against defendants Gedney, Moyle, Baca, Murphy, Buencamino and Aranas.

25 (b) The Due Process Clause claims should be **DISMISSED WITH PREJUDICE**;

26 (c) The state law claims for medical malpractice should be **DISMISSED WITH**
27 **PREJUDICE**;

28 (2) The FAC (ECF No. 23 at 3-17) should be **FILED**;

(4) If service cannot be accepted for any of the named defendant(s), Plaintiff shall file a motion identifying the unserved defendant(s), and requesting issuance of a summons. For the defendant(s) as to which the Attorney General's Office has not provided last-known-address information, Plaintiff is required to supply the full name and address for the defendant(s).

12 (5) If the Attorney General's Office accepts service of process for any named defendant(s), such
13 defendants should be required to file and serve an answer or other responsive pleading within **twenty-**
14 **one days** of the date it files a notice of acceptance of service.

15 (6) From this point forward, Plaintiff shall serve upon defendant(s), or if an appearance has been
16 entered by counsel, upon the attorney(s), a copy of every pleading, motion or other document submitted
17 for consideration by the court. Plaintiff shall include with the original document submitted for filing a
18 certificate stating the date that a true and correct copy of the document was mailed or electronically filed
19 to the defendants or counsel for the defendants. If counsel has entered a notice of appearance, Plaintiff
20 shall direct service to the individual attorney named in the notice of appearance, at the physical or
21 electronic address stated therein. The court may disregard any document received which has not been
22 filed with the Clerk, and any document that fails to include a certificate showing proper service.

23 The parties should be aware of the following:

24 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this
25 Report and Recommendation within fourteen days of receipt. These objections should be titled
26 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points
27 and authorities for consideration by the district judge.

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1 2. That this Report and Recommendation is not an appealable order and that any notice of appeal
2 pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of
3 judgment by the district court.

4 DATED: October 31, 2017.

5 William G. Cobb
6 WILLIAM G. COBB
7 UNITED STATES MAGISTRATE JUDGE

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